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CURRENT LEGAL PERIODICALS AND BOOK REVIEWS.

FARNHAM ON THE LAW OF WATERS AND WATER RIGHTS, INTERNATIONAL, NATIONAL, STATE, MUNICIPAL, AND INDIVIDUAL, INCLUDING IRRIGATION, DRAINAGE, AND MUNICIPAL WATER SUPPLY. Three volumes. Pp. cxxx+2956. By HENRY PHILIP FARNHAM, M.L. (Yale). Rochester: The Lawyers' Co-operative Publishing Company. 1904.

This work, to quote an announcement respecting it, presents the subject of "Waters" in "every one of its numberless ramifications."

Its plan provides for a statement of principles in a general view, followed chiefly in notes by a statement of them in such detailed application as the author deemed well. It is a method which compels some repetition, and which it was probably found impracticable to observe throughout the work.

Chapter XVII, on "Unsafe Streets and Premises," begins with a section entitled "Liability for Injury because of Water in Streets." Instead of outlining first the general principles applicable, the second sentence states the specific instance of pits in highways. The third reverts to general statement, while the fourth recurs to a pit or hole. The chapter is an interesting and valuable one; but this reviewer's opinion is that, unlike most of the work, it is subject to the criticism of separating principles too far apart by the interjection of instances.

The treatment in this chapter suggests the thought that the notes could have been printed as the text and the text as the notes.

Another feature which strikes the reader of Chapter XVII is the omission to distinguish the decisions as those of supreme or lower tribunals. In some instances this distinction would be of interest. Thus we have the statement without discrimination of *Lehman v. Brooklyn*, 29 Barb. 234. The author cites that case in the following language: "But the liability of a city for the death of a child is not shown by the fact that the city maintained a well in its streets, with an opening level with the sidewalks, covered with a lid on leather hinges; and that the child, who was of tender age, was found in the well." The criticism at this place is the more important for the reason that the case seems to be one concerning a well-cover which a young child could lift. The reader's mind reverts at once to the turntable cases, and he might well expect either a criticism of

the decision or else a vindication of it by a more pertinent statement of it. So at page 1512 the reader would like to know whether *Jessup v. Bamford Mfg. Co.*, 66 N. J. Law, 641, was a decision by the highest court in New Jersey or not. The case is thus presented: "There is a New Jersey case which is out of harmony with the decisions elsewhere. In it the owner of a lot sloping towards a street erected a building thereon upon a walk, through which holes were left to allow the water to escape. The result was that water flowed from the holes across the walk and in cold weather formed ice. A traveller on the walk, having fallen upon such ice and having been injured, brought an action against the property owner, who was held not liable on the ground that the altered transmission of surface water, caused by the erection of a building upon land over which it is accustomed to flow, affords no ground of action to a person who suffers injury by reason thereof. This decision cannot be sustained on principle. The water was concentrated into channels, and cast directly upon the walk in such a way that injury must almost necessarily result in freezing weather. Such conduct must be regarded as a nuisance rendering the one creating it liable for the consequences. Had the ice been caused to form merely because of an alteration in the grade between the street and the abutting property, the principle laid down in that case would have been applicable, and the abutting owner would not have been liable; but the principle is not applicable to the facts of the case." The presentation is commendable in that the author points out therein what certainly does appear to be error. It is liable to criticism because the principle on which the court went should have been clearly stated by the author. As it is, the reader is left to his own reflections, which probably convince him that the court must have had in mind the thought that the lot-owner is not liable for injury through natural drainage.

Something in the way of reference to legislation might well have been given in Chapter XVII. A later edition will doubtless supply this need.

Part I of the work is devoted to "Rights of States and Nations." Chapter I relates to "International Rights." The plan of the work is not strictly followed in this part. Matters between state and citizen cannot be looked on as of international character, and portions of Chapter I will no doubt be transported to another chapter in a later edition. The right of *The Harriet* to the bounty allowed the vessels employed at sea in the cod-fisheries, based on the fact that she was out of the limits of a port or harbor, was not an "international right" and has no place on page 5, where it is found. The same criticism is to be made as respects the note on the same page as to

U. S. v. Smith, 1 Mason, 147. The note states that a vessel may be at sea, within the meaning of the act prescribing punishment for revolts on the high seas, although within the three-mile limit. This was not an international affair, and the note belongs in another place. At page 21 the English law is stated to be that a vessel accepting compulsorily a pilot is not liable for the pilot's negligence; yet one would prefer a statement of the American law on that subject. Curiously enough, it is not given. The omission is the greater as in *The China*, 7 Wall. 53, the vessel was held liable, although the owners are not: *Homer Ramsdell Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406. Comment may likewise be made on the weakness of the assertion of jurisdiction over American waters like the Delaware Bay.

The modern rule as to rivers flowing through several countries is stated at page 29. The passage of the river is there said to be "their common property." "Each is entitled to its navigation throughout its whole extent, so far as it can be exercised without injury to the rights of others." It would have added to the interest of this section had some account been given of the growth of this rule, which, after all, is based on comity or treaty. The authorities on International Law are not even yet wholly agreed on this question, although it is safe to say that unneighborly conduct towards other nations herein would be looked on as offensive. Some historical account would have been of interest in this connection. The excitement in the West over the right to navigate the Mississippi when New Orleans was held by Spain is even yet vividly remembered. The dispute was ended in 1795 by the Treaty of San Lorenzo el Real. The Treaty of 1854 between the United States and Great Britain secured to Americans the free navigation of the St. Lawrence in return for freedom to British subjects to navigate Lake Michigan, the British Government retaining the right to revocation. The Treaty of Washington of 1871 threw open the navigation of the St. Lawrence to Americans "forever." Lawrence, in his "Principles of International Law," second edition, gives these and other instances.

The occupation of the coasts along the New Jersey and New England shores for water-resorts has reached such a degree that even now the work of "reclaiming" tide-lands has begun, and at no distant day many a legal adviser will doubtless turn to those parts of Mr. Farnham's work wherein he treats of "Tidal Lands." He gives quite a treatise to this subject.

The author is not one of those who are awed by great names. He thinks that Lord Coke utterly misconceived Chapter XVI of "Magna Charta," prohibiting, with some exceptions, guards or obstructions in the rivers, contending that this related only to

interference with navigation and not to grants of private fisheries. He disapproves sadly of *Shrunk v. The Schuylkill Navigation Co.* in 14 S. and R., sustaining an enactment prohibiting the Schuylkill Navigation Company from building a dam in the Schuylkill River to the interference with a shad fishery which plaintiff claimed by reason of ownership of the river front at that place, a few miles above the mouth of the river. The plaintiff claimed that the stream was a non-tidal one and that his ownership ran to mid-channel.

The court held that the common law of England did not apply to the navigable streams of Pennsylvania even above tide-water. The author certainly does cite an imposing array of states holding to the English common law. He exclaims against the uncertainty in title which he says must exist in the case of non-tidal streams suddenly shifting their courses. The Pennsylvania lawyer, however, as he thinks of the noble rivers which are a glory of his commonwealth, will prefer the doctrine of the Pennsylvania court. There is some unevenness of style in these two chapters which probably grows out of the plan of separate statement of principles in introductions. A smooth, good literary style suddenly gives way to a jolting, laborious travel among particular cases. Take Section 408 as an example. There is a constant repetition in one form or another of the expression, "wrongful fishing." One general expression covering all the sentences would have reduced the size of the section by half, and would have improved its literary tone.

Another of the minor criticisms of Chapter XIV is the separation of sections relative to procedure. They should be together, and condensed by comprehensive statements. The author seems to misapprehend a case which he mentions with strong condemnation. The city of Waterville, in the state of Maine, was indebted even beyond the constitutional limit. The legislature created a special water district, and authorized the district to erect water works and to give its bonds therefor. Because the water district embraced a portion of the city, the author protests against the decision sustaining the charter. *Kennebec Water District v. Waterville*, 96 Maine, 234. A reference to the report of the case shows that the district included only a part of the city so indebted, and included also two other towns, besides outlying country parts. The population and wealth of these towns were not given, and, moreover, the opinion of the court states that the charter of the water district gave no authority to tax either people or property within the limits of the city of Waterville.

If we turn over the pages of this work, passing from subject to subject, it is evident that we have before us an invaluable

study, admirably performed, but with expressions of opinion with which the reader will sometimes disagree. If here and there in the chapter on "International Law" there is an omission of historical matter, or a scant treatment of subjects which have excited great political discussions, and an inclusion of matters belonging under other heads, these are not serious faults; for those who have recourse to the law or history in such matters will hardly resort to books on waters, or if they do, they will not stop with these books.

Glances through the work at large have created the impression that here is a work exceedingly thorough, written for the most part in good, fresh style, abounding in interesting illustrations which do not bear down the text, and well indexed. Pennsylvania cases, such as the celebrated Sanderson decisions, and the Meadville and other water-supply cases, have been given their due place. The last decision in the Sanderson case meets with the author's disapproval. It is well to have the academic view, although it is true that practical responsibility must create the best judgment. The Pennsylvania lawyer will here again prefer the doctrine of the judicial tribunal. As Chief Justice Paxson said, the landowner bought in what he knew was a mining region, made his improvements in that knowledge, and must conform to the necessities of that vital industry.

Luther E. Hewitt.

A HISTORY OF MATRIMONIAL INSTITUTIONS. By GEORGE ELLIOTT HOWARD, PH.D. Three volumes. Pp. xv+473 +449+497. Chicago: The University Press, Callaghan & Co. London: T. Fisher Unwin, Paternoster Square. 1904.

While Mr. Howard claims to distrust "phrase-making," his phrase that "History is past sociology and sociology present history" so completely characterizes his work that it would be an injustice to him not to use it. The sociological point of view dominates everywhere and is obvious throughout the book. It is not so much a history of the facts with which we are presented as a picture of the conditions which arise from a certain set of facts.

The first volume gives an analysis of the theories which have been formulated concerning the primitive matrimonial institutions, and includes an examination of the literature upon the subject. As each theory claims to have historical support and to be deduced from a critical study of the life of primitive man, we get the history of these early institutions as it appears through the medium of minds strongly colored with some—usually preconceived—theory, which theory they are strongly